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Phoenix Oasis Sdn Bhd v SL Land Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(W)-652–06 OF 2020
NOR BEE ARIFFIN, AZIZAH NAWAWI AND LEE HENG CHEONG JJCA
12 OCTOBER 2021

C

Civil Procedure — Pleadings — Failure to plead — Appellant filed action for breach of joint venture agreement ('JVA') against respondent — Respondent contended that appellant failed to give notice to remedy pursuant to JVA — Whether the issue of failure to give notice to remedy was pleaded by respondent

D

Contract — Breach — Joint venture agreements — Appellant transferred land to respondent pursuant to JVA — Respondent failed to pay outstanding consideration price of land — Appellant filed action for breach of JVA against respondent — High Court dismissed appellant's action — Appellant filed appeal — Respondent filed cross-appeal — Whether appellant failed to give notice to remedy to respondent — Whether two advances made by respondent were part payment towards consideration price of land — Whether slight difference between the sum in appellant's claim and the sum as testified by appellant's witness was sufficiently material and serious as to warrant dismissal of appellant's case — Whether consideration price should be calculated pursuant to JVA and not second supplementary agreement

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G

Evidence — Adverse inference — Failure to call witness — Respondent contended that consideration price should be calculated pursuant to second supplementary agreement and not joint venture agreement — Whether learned High Court judge should invoke adverse inference against respondent for non-calling of lawyer who prepared the second supplementary agreement as witness — Evidence Act 1950 s 114(g)

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The appellant filed an action against the respondent for breach of joint venture agreement ('the JVA') for the failure of the respondent to pay the outstanding consideration price of a land ('the said land') sold by the appellant to the respondent pursuant to the JVA. At the end of the case, the High Court judge held that: (a) on the balance of probabilities the consideration price should be calculated at RM39.36 per sq ft ('PSF') pursuant to cl 4.1 of the JVA and not RM19 PSF pursuant to the second supplementary agreement; (b) the payment paid by the respondent in the sum of RM2,160,000 were indeed part payment

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towards the consideration price for the said land; (c) there was no explanation on the difference of the sum of RM6,971,018.50 being the consideration price yet to be paid as testified by the appellant's witness ('PW2') with the appellant's claim of RM6,969,685.18; and (d) the appellant had failed to give notice to remedy in accordance with cl 17.2 of the said JVA. Based on the above findings, the High Court judge dismissed the appellant's action, hence, the present appeal by the appellant. The respondent had also filed a cross-appeal against the decision, specifically on the learned judge's finding that the consideration price should be calculated at RM39.36 PSF and not RM19 PSF.

Held, allowing the appeal, setting aside the High Court's decision, and dismissing the respondent's cross-appeal with global costs to the appellant in the sum of RM35,000 subject to allocator:

(1) The slight difference between the appellant's claim of RM6,969,685.18 and the sum of RM6,971,018.50 as testified by PW2 was not so sufficiently material and serious as to warrant the dismissal of the appellant's case. The learned High Court judge had failed to appreciate that the difference was inconsequential and was capable of correction. This was because the consideration price claimed by the appellant was computed based on the formula stated in cl 4.1 of the JVA. The area of the said land in the issue document of title was measured in square meters. As such, in computing the consideration price, one needs to convert square meter to square feet accordingly. The minor difference was a result of the conversion process. In any event, the consideration price could be mathematically computed, by applying the stipulated formula (see paras 25–28).

(2) A perusal of the respondent's amended statement of defence clearly showed that the issue of the appellant's failure to give notice to remedy under cl 17.2 of the JVA was never pleaded. Thus, the learned High Court judge's reliance on the unpleaded cl 17.2 was a grave error on his part. It was trite that parties were bound by their pleadings. The respondent could not rely on a defence which was not pleaded. It was not the duty of the court to invent or create a cause of action or a defence under the guise of dispensing justice for the litigants (see paras 29–30 & 33).

(3) The learned judge erred in law and in fact in holding that the advances amounting to RM2,160,000 paid by the respondent to the appellant were in part payment towards the consideration price for the said land. Based on the evidence, it was clear that the said sum had been treated as loans to the directors of the respondent and the said loans were 'repaid' by them through the declaration of RM2.5m dividends. As a result, the learned judge clearly ignored the fact that the advances could no longer go towards reducing the consideration price of the said land. Thus, the

learned judge's finding that he did not see how the conversion of the two advances into a loan to both the said directors altered the situation was erroneous. The learned judge was plainly wrong in arriving in his decision and committed a serious appellate error that justified appellate intervention as His Lordship had made erroneous finding of facts based on the evidence before him and applied the relevant laws incorrectly (see paras 37, 42 & 44–45).

(4) In respect of the cross-appeal, the learned judge was right in holding that the agreed consideration was the original consideration, that was RM39.36 PSF and not the reduced consideration of RM19 PSF. The court's decision was based on the following findings: (a) the appellant's pleaded case was grounded on the claim for the original consideration as stated in the said JVA, as such, there was no necessity for the appellant to plead the existence of the second supplementary agreement; (b) DW1 admitted that the reduced consideration was only to facilitate the transfer of the said land for the purpose of amalgamation, that as far as the entitlement was concerned, the price was the entitlement of the appellant in the said JVA, that both the audited account and the ledger of the appellant had confirmed that the consideration for the said land was the original consideration, and the appellant paid the Real Property Gain Tax in respect of the said land based on the original consideration; (c) the learned judge should have invoked an adverse inference against the respondent for failing to call the lawyer who had prepared the second supplementary agreement to testify under s 114(g) of the Evidence Act 1950; (d) the respondent's account manager, PW2, testified that she was not informed of the reduction; and (e) cl 1(a) and (b) of the second supplementary agreement clearly showed that the appellant's entitlement shall remain the same (see paras 49–50 & 53–59).

(5) In the light of the above findings, there was cogent evidence that there was no reduction of the original consideration of the said land to the reduced consideration as alleged by the respondent. The respondent's contention was inconsistent with all the relevant contemporaneous documents. In respect of the cross-appeal, the learned judge did not err in arriving at his decision and did not commit any appealable error that justify appellate intervention as His Lordship had made finding of facts based on the evidence before him and applied the relevant laws correctly (see paras 60–61).

[Bahasa Malaysia summary

Perayu memfailkan tindakan terhadap responden di atas pelanggaran perjanjian usaha sama ('JVA') kerana kegagalan responden membayar harga bayaran tertunggak bagi tanah ('tanah tersebut') yang dijual oleh perayu kepada responden menurut JVA tersebut. Di akhir kes, hakim Mahkamah Tinggi memutuskan bahawa: (a) di atas imbangan kebarangkalian, harga

bayaran hendaklah dikira pada RM39.36 setiap kaki persegi ('PSF') menurut klausa 4.1 JVA dan bukan RM19 PSF menurut perjanjian tambahan kedua; (b) bayaran yang dibayar oleh responden berjumlah RM2,160,000 sememangnya sebahagian daripada bayaran terhadap harga bayaran bagi tanah tersebut; (c) tiada penjelasan mengenai perbezaan jumlah RM6,971,018.50 sebagai harga yang belum dibayar seperti yang dinyatakan oleh saksi perayu ('PW2') dengan jumlah tuntutan perayu sebanyak RM6,969,685.18; dan (d) perayu telah gagal memberi notis remedi menurut klausa 17.2 JVA tersebut. Berdasarkan dapatan-dapatan di atas, hakim Mahkamah Tinggi telah menolak tindakan perayu, justeru, rayuan ini oleh perayu. Responden juga telah memfailkan rayuan balas terhadap keputusan tersebut, khususnya ke atas keputusan hakim yang bijaksana bahawa harga bayaran harus dikira pada RM39.36 PSF dan bukan RM19 PSF.

Diputuskan, membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan menolak rayuan balas responden dengan kos keseluruhan sebanyak RM35,000 tertakluk kepada alokator:

(1) Sedikit perbezaan di antara tuntutan perayu sebanyak RM6,969,685.18 dan jumlah RM6,971,018.50 seperti yang dinyatakan oleh PW2 adalah tidak cukup penting dan serius sehingga mewajarkan kes perayu ditolak. Hakim Mahkamah Tinggi yang bijaksana telah gagal memahami bahawa perbezaan tersebut adalah tidak penting dan boleh diperbetulkan. Ini adalah kerana harga bayaran yang dituntut oleh perayu telah dikira berdasarkan formula yang dinyatakan dalam klausa 4.1 JVA. Keluasan tanah tersebut dalam dokumen hakmilik keluaran diukur dalam meter persegi. Oleh itu, dalam mengira harga bayaran, seseorang perlu menukar meter persegi kepada kaki persegi. Perbezaan kecil tersebut adalah hasil daripada proses penukaran tersebut. Walau apa pun, harga bayaran boleh dikira secara matematik, dengan menggunakan formula yang telah ditetapkan (lihat perenggan 25–28).

(2) Penelitian terhadap pernyataan pembelaan terpinda responden jelas menunjukkan bahawa isu kegagalan perayu untuk memberikan notis remedi di bawah klausa 17.2 JVA tidak pernah diplidkan. Oleh itu, pergantungan hakim Mahkamah Tinggi yang bijaksana kepada klausa 17.2 yang tidak diplid adalah satu kesilapan besar di pihaknya. Sudah menjadi undang-undang yang mantap bahawa pihak-pihak terikat dengan pliding mereka. Responden tidak boleh bergantung kepada pembelaan yang tidak diplid. Ia bukanlah menjadi kewajipan mahkamah untuk mencipta atau membuat kausa tindakan atau pembelaan dengan alasan untuk memberikan keadilan kepada pihak litigasi (lihat perenggan 29–30 & 33).

(3) Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa wang pendahuluan berjumlah

RM2,160,000 yang dibayar oleh responden kepada perayu adalah sebahagian daripada bayaran terhadap harga bayaran bagi tanah tersebut. Berdasarkan keterangan, adalah jelas bahawa jumlah tersebut telah dianggap sebagai pinjaman kepada pengarah responden dan pinjaman tersebut 'dibayar balik' oleh mereka melalui pengisytiharan dividen RM2.5 juta. Akibatnya, hakim yang bijaksana jelas tidak mengendahkan hakikat bahawa wang pendahuluan tersebut tidak lagi dapat mengurangkan harga bayaran tanah tersebut. Oleh itu, keputusan hakim yang bijaksana bahawa beliau tidak dapat melihat bagaimana penukaran kedua-dua pendahuluan kepada pinjaman kepada kedua-dua pengarah tersebut telah mengubah keadaan adalah salah. Hakim yang bijaksana jelas salah dalam membuat keputusan dan melakukan kesilapan rayuan yang serius yang mewajarkan campur tangan rayuan kerana Yang Arif hakim telah membuat dapatan fakta yang salah berdasarkan keterangan di hadapannya dan menggunakan undang-undang yang berkaitan secara salah (lihat perenggan 37, 42 & 44–45).

(4) Berkenaan dengan rayuan balas, hakim yang bijaksana telah membuat keputusan yang tepat apabila memutuskan bahawa bayaran yang dipersetujui adalah bayaran asal, iaitu RM39.36 PSF dan bukannya bayaran yang dikurangkan iaitu RM19 PSF. Keputusan mahkamah adalah berdasarkan kepada dapatan-dapatan berikut: (a) kes yang diplidkan oleh perayu adalah berdasarkan tuntutan untuk bayaran asal seperti yang dinyatakan dalam JVA tersebut, oleh itu, tidak ada keperluan untuk perayu memplidkan kewujudan perjanjian tambahan kedua; (b) DW1 mengakui bahawa bayaran yang dikurangkan tersebut hanya untuk memudahkan pemindahan tanah tersebut bagi tujuan penyatuan tanah, bahawa berkenaan dengan hak, harga adalah hak perayu seperti yang dinyatakan dalam JVA tersebut, bahawa kedua-dua akaun teraudit dan lejar perayu telah mengesahkan bahawa bayaran bagi tanah tersebut adalah bayaran asal, dan perayu membayar Cukai Keuntungan Harta Tanah bagi tanah tersebut berdasarkan bayaran asal; (c) hakim yang bijaksana sepatutnya membuat inferens buruk di bawah s 114(g) Akta Keterangan 1950 terhadap responden kerana gagal memanggil peguam yang telah menyediakan perjanjian tambahan kedua tersebut untuk memberi keterangan; (d) pengurus akaun responden, PW2, memberi keterangan bahawa dia tidak dimaklumkan tentang pengurangan tersebut; dan (e) klausa 1(a) dan (b) perjanjian tambahan kedua tersebut dengan jelas menunjukkan bahawa hak perayu akan kekal sama (lihat perenggan 49–50 & 53–59).

(5) Berdasarkan dapatan-dapatan di atas, terdapat keterangan yang kukuh bahawa tiada pengurangan bayaran asal tanah tersebut kepada bayaran yang dikurangkan seperti yang didakwa oleh responden. Hujahan responden adalah tidak konsisten dengan semua dokumen sedia ada yang berkaitan. Berkenaan dengan rayuan balas, hakim yang bijaksana tidak

terkhilaf dalam membuat keputusan dan tidak melakukan apa-apa kesilapan yang boleh dirayu yang mewajarkan campur tangan rayuan kerana Yang Arif hakim telah membuat dapatan fakta berdasarkan keterangan di hadapannya dan menggunakan undang-undang yang berkaitan dengan betul (lihat perenggan 60–61).]

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857, FC (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665; [2009] 3 MLRA 162, FC (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Civil Suit No BA-22NCC-10–01 of 2019 (High Court, Shah Alam)

Chong Phow Yew (Lee Han Meng with him) for the appellant.
Richard Tee (Caryn Shua with him) for the respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] This is an appeal by the appellant/plaintiff against the decision of the Shah Alam High Court judge ('learned High Court judge') dated 1 June 2020 which dismissed the appellant/plaintiffs' claim. The appellant/plaintiff sued the respondent/defendant for the breach of a joint venture agreement dated 18 July 2012 ('the said JV agreement') whereby the appellant/plaintiff's land described as HS (D) 203955 PT 1081, which is situated in Bandar Nilai Utama, Daerah Seremban, Negeri Sembilan ('the said Land A') was to be transferred to the respondent/defendant for a consideration price of RM6,969,685.18, based on the sum of RM39.36 PSF ('PSF') and to be paid within 36 months from the date of receipt by the appellant/plaintiff of the respondent/defendant's written confirmation that the acceptable planning permission and acceptable conversion approval have been obtained.

[2] There is also a cross-appeal by the respondent/defendant against that part of the High Court's decision where the learned High Court judge found that the agreed consideration of the said Land A, is RM39.36 PSF ('original

consideration') as per the said joint venture agreement dated 18 July 2012 instead of RM19 PSF ('reduced consideration') as contended by the respondent/defendant.

[3] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

[4] We heard the appeal and after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeal and unanimously allowed the appeal and dismissed the cross-appeal with costs. We now give reasons for our decision in respect of the appeal and cross-appeal.

THE SALIENT FACTS

[5] The defendant's company was incorporated a few months after the incorporation of the plaintiff's company in the year 2011, to develop one Commercial Development Project called 'Sentral Bazar' at Bandar Nilai Utama ('the said project').

[6] At all material times the plaintiff and the defendant had two common directors and shareholders namely, Yeoh Thiam Leong and Yeoh Thiam Soon who holds the following shares in the plaintiff and the defendant:

(a) Yeoh Thiam Leong holds 60% shares in the plaintiff and 35% shares in the defendant; and

(b) Yeoh Thiam Soon holds 40% shares in the plaintiff and 65% shares in the defendant.

[7] The said project is to be carried out on three adjacent lands held under HS (D) 203953 PT 1079, HS (D) 203954 PT 1080 and HS (D) 203955 PT 1081 respectively, all three lands are in Bandar Nilai Utama, Daerah Seremban, Negeri Sembilan, with the category of land use being for 'industrial'. The particulars and ownerships of the three adjacent lands are as follows:

HS (D) 203955 'PT 1081'	HS (D) 203954 'PT 1080'	HS (D) 203953 'PT 1079'
'Land A' measuring approximately 16,764.9 sqmt (Phoenix Oasis Sdn Bhd was the Proprietor) ('the plaintiff')	'Land B' measuring approximately 16,736.5 sqmt (Yeoh Thiam Soon & Foong Wei Ching were the proprietors)	'Land C' measuring approximately 16,450.7 sqmt (Twenty Twenty Food And Beverage Sdn Bhd was the proprietor)

[8] The plaintiff was the registered and beneficial owner of the said Land A measuring approximately 16, 764.9 sqmt in area with the category of land use, being classified for 'industrial'.

[9] The said Land A was charged to CIMB Bank Bhd ('CIMB') to secure the existing loan facilities granted to the plaintiff ('the existing loan').

[10] On or about 18 July 2012, the plaintiff and the defendant signed the said JV agreement for the defendant, to develop the said Land A and to this end, the said Land A was transferred to the defendant for an agreed consideration price of RM6,969,685.18 based on RM39.36 PSF and to be paid within 36 months from the date of receipt by the plaintiff of the defendant's written confirmation that the acceptable planning permission and acceptable conversion approval have been obtained.

[11] On or about 27 February 2014, the plaintiff and the defendant subsequently entered into a supplemental agreement ('the said supplemental agreement').

[12] The defendant made a payment of RM1,660,000 to CIMB Bank Bhd through the plaintiff on 3 March 2014. Thereafter, the defendant made another payment in the sum of RM500,000 to the plaintiff. The said Land A was subsequently redeemed from CIMB Bank Bhd.

[13] After the signing of the said supplementary agreement, the plaintiff and the defendant entered into a second supplementary agreement dated 16 February 2015 ('the said second supplementary agreement') for the purpose of transferring and amalgamation of the said land a with the other said two pieces of lands namely PT 1079 and PT 1080 into one title, pursuant to the said JV agreement.

[14] Later, on or about year 2017, the said Land A was amalgamated with the other said two pieces of land, namely, PT 1079 and PT 1080 into one document of title which is described as Geran Hakmilik No 267772, Lot 65799, Bandar Nilai Utama, Daerah Seremban, Negeri Sembilan for the purpose of development and registered under the defendant's name.

[15] On or about 30 January 2019, the plaintiff had filed a suit at the Shah Alam High Court to claim the outstanding consideration price of RM6,969,685.18 from the defendant together with the interest and costs. The suit was dismissed by the learned High Court judge. Hence this appeal and cross-appeal.

A FINDINGS OF THE HIGH COURT

[16] The learned High Court judge in his grounds of judgment dated 14 July 2020 held as follows:

B (a) that on the balance of probabilities the consideration price should be calculated at RM39.36 PSF pursuant to cl 4.1 of the said joint venture agreement dated 18 July 2012;

(b) that the payment paid by the defendant in the sum of RM2,160,000 were indeed part payment towards the consideration price for the said C Land A;

(c) there was no explanation on the difference of the sum of RM6,971,018.50 with the plaintiff's claim of RM6,969,685.18; and

D (d) that the plaintiff had failed to give notice of remedy in accordance with cl 17.2 of the said JV agreement.

[17] The learned High Court judge, after a full trial, dismissed the plaintiff's claim principally on the ground that the plaintiff had failed to give a notice to E remedy pursuant to cl 17.2 of the said JV agreement. The learned High Court judge had also found that the defendant had made part payment of RM2,160,000 towards the consideration price and that the price for the said Land A is the agreed consideration price of RM39.36 PSF and not RM19 PSF.

F THE PLAINTIFF'S CONTENTIONS BEFORE THIS COURT

Main appeal

[18] Before us, the plaintiff contended as follows:

G (a) that the learned High Court judge relied on cl 17.2 of the said JV agreement as the main ground to dismiss the plaintiff's claim when it was not even pleaded inthe defendant's statement of defence;

(b) that the said cl 17.2 is not applicable to the plaintiff's cause of action for recovery of the consideration price of the land as the land had already H been transferred to the defendant;

(c) that the learned High Court judge erred in law and in fact in holding that the advances amounting to RM2,160,000 by the defendant to the plaintiff are in part payment towards the consideration price of the said I Land A;

(d) that the learned High Court judge was unduly influenced by the slight difference between the plaintiff's claim of RM6,969,685.18 and the evidence of PW2 that the consideration price yet to be paid was RM6,971,018.50;

Cross-appeal

(e) that the defendant's notice of cross-appeal is incompetent as that it seeks not to vary the decision of the High Court but to challenge the finding of facts which has to be brought by a separate notice of appeal; and

(f) that the learned High Court judge was right in finding that the agreed consideration price was RM39.36 PSF and not RM19 PSF as alleged by the defendant.

THE DEFENDANT'S CONTENTIONS BEFORE THIS COURT

Main appeal

[19] The defendant in response, contended, inter alia, as follows:

(a) that the plaintiff had failed to give notice to remedy in accordance with cl 17.2 of the said JV agreement thus depriving the defendant, an opportunity to remedy the breach as required in the said JV agreement;

(b) the plaintiff admitted that the plaintiff started to calculate the completion period after the acceptable planning permission and acceptable conversion approval have been obtained which is not in accordance with the relevant clauses stated in the said JV agreement. Thus, the defendant contended that the plaintiff's claim is misconceived as according to the said JV agreement, the completion period shall be calculated after the plaintiff received the written confirmation from the defendant that the two approvals have been obtained;

(c) thus, the plaintiff's claim against the defendant is defective and wrongful in law because the plaintiff is confused as to when the calculation for the 36 months started to run;

(d) that the amount claimed by the plaintiff against the defendant in the sum of RM6,969,685.18 is misconceived and that the plaintiff themselves was uncertain about the total claim against the defendant;

(e) that the learned High Court judge was correct in his judgment to find that there was no explanation for the difference of the sum of RM6,971,018.50 as testified by PW2, the sum of RM6,961,019 as stated in the email dated 18 February 2019 and the sum of RM6,969,685.18 claimed by the plaintiff vide the statement of claim;

(f) that the learned High Court judge was correct in law and in fact, in deciding that the payment of RM2,160,000 were indeed part payment towards the consideration price. pursuant to cl 4.2 of the said JV agreement, which provides that 'any payments made by the Developer (defendant) and any progress payments from the sale of Unit paid towards the existing loan, for and on behalf of the Proprietor (plaintiff)

shall be deemed to be payment towards the Consideration Price. It is hereby agreed that the Consideration Price shall be paid firstly to settle the existing loan in full and thereafter to settle the Balance Consideration Price to the Proprietor (plaintiff)';

(g) that the learned High Court judge was correct, in holding that he did not see how the conversion/reclassification of the payment of two advance payment amounting to RM2,160,000 into a loan to both the directors altered the situation. Furthermore, PW1 had admitted in his testimony that there was no resolution from the plaintiff to carry out such reclassification; and

(h) that the learned High Court judge was correct in his judgment to find that there was no explanation for the difference of the sum of RM6,971,018.50 as testified by PW2, the sum of RM6,961,019 as stated in the email dated 18 February 2019 and the sum of RM6,969,685.18 claimed by the appellant/plaintiff vide the statement of claim.

Cross-appeal

(i) that the cross-appeal filed by the defendant is not on substantive finding of facts as the plaintiff's claim was dismissed on the grounds that the plaintiff had failed to give notice to remedy in accordance with cl 17.2 of the said JV agreement and hence, the claim is pre-mature. The filing of the cross-appeal by the defendant is to vary the finding of the learned High Court judge on the finding of the calculation of the original consideration. Hence, the preliminary objection ought to be rejected;

(j) that the finding by the learned High Court judge on the issue of calculation of the original consideration should be varied to RM19 PSF instead of the sum of RM39.36 PSF although the learned High Court judge dismissed the plaintiff's claim based on the ground that the plaintiffs claim is premature; and

(k) the existence of the said second supplementary agreement that was signed between the defendant and the plaintiff was not disputed. The learned High Court judge should take into consideration of the evidence in terms of documentary and oral evidence before him especially the fact that both parties had agreed to reduce the original consideration to the reduced consideration of RM19 PSF pursuant to the execution of the said second supplementary agreement as well as the fact that the said Land A was transferred into the name of the defendant based at the consideration of RM19 PSF.

THE LAW

[20] It is trite law that the specific finding of facts by the learned High Court judge as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: see *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857 (FC) paras 41–48;

[21] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence*. (Emphasis added.)

[22] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[23] Bearing in mind, the above principles distilled from the above authorities, we will now consider the plaintiff's appeal.

FINDINGS OF THIS COURT

Main appeal

[24] In para 25 of the grounds of judgment, the learned High Court judge held as follows:

> [25] Evidence was also led by the plaintiff that a sum of RM10,000 was further paid as partial payment on land cost (as stated in B p 4) but again PW2 told the court that this too was treated as an advance. According to PW2 a sum of RM6,971,018.50 being the consideration price was yet to be paid. The plaintiff put up a claim of RM6,969,685.18. There was no explanation for this difference.

[25] In respect of the above paragraph of the learned High Court judge's grounds of judgment, we respectfully find that the slight difference between the plaintiff's claim of RM6,969,685.18 and the sum of RM6,971,018.50,

being the amount stated in the evidence of PW2 that the consideration price yet to be paid was RM6,971,018.50, is not so sufficiently material and serious as to warrant the dismissal of the plaintiff's case and as such, the learned High Court judge had misdirected himself on this issue.

[26] We are of the considered opinion that the learned High Court judge fell into error and misdirected himself in dismissing the plaintiff's case when the learned High Court judge could have deducted the sum of RM10,000 from the plaintiff's claim and allow the balance of the plaintiff's claim.

[27] Further, we are of the considered view that the learned High Court judge has failed to appreciate that the difference is inconsequential and is capable of correction. This is because the consideration price claimed by the plaintiff was computed based on the formula stated in cl 4.1 of the said JV agreement. Clause 4.1 provides for the computation of the consideration price of the said Land A as follows:

> ... Consideration Price calculated at the rate of Ringgit Malaysia *Thirty-Nine and Sen Thirty Six per square foot (RM39.36 psf) only of the said Land. In computing the Consideration Price, the area of the said Land shall be the area according to the Issue Document of Title of the said Land as at the date of the Agreement.* (Emphasis added.)

[28] The area of the said Land A in the issue document of title is measured in square metres. As such, in computing the consideration price, one needs to convert square metre to square feet accordingly. We find that the minor difference is a result of the conversion process. In any event, the consideration price can be mathematically computed, by applying the stipulated formula.

[29] Another main ground for the dismissal of the plaintiff's case was the learned High Court judge's reliance on cl 17.2 of the said JV agreement when such clause was not pleaded in the defendant's amended statement of defence. Thus, the learned High Court judge's reliance on the unpleaded cl 17.2 is a grave error on his part.

[30] A perusal of the defendant's amended statement of defence clearly showed that the issue of the plaintiff's failure to give notice to remedy under cl 17.2 of the said JV agreement was never pleaded (see pp 52–56 of encl 4).

[31] Clause 17.2 of the said JV agreement reads as follows:

> If either party shall
>
> (a) materially breaches any part of this Agreement and fails to remedy the same within twenty-one (21) working days from the service of any written notice by the other party complaining of such breach;
>
> (b) Then the other party shall be entitled to terminate this Agreement and

> claim damages for any consequential loss and damage suffered, whether economic or otherwise but without prejudice to the claims in respect of antecedent breach and all provisions which are applicable in the event of termination of this Agreement.

[32] The learned High Court judge in para 27 of his grounds of judgment held as follows:

> YTL admitted that the plaintiff did not give such notice. It was the case for the plaintiff that the defendant had breached cl 4.1 of the JVA. In *SPM Membrane* it was held that the notice to remedy must be given as it was provided for in the contract before either party can terminate the said contract. Here, the defendant was not given the opportunity to remedy the breach as required in the JVA (see p 14 of encl 8).

[33] It is trite that parties are bound by their pleadings. The defendant cannot rely on a defence which is not pleaded. On this, we are of the respectful view that it is not the duty of the court to invent or create a cause of action or a defence under the guise of dispensing justice for the litigants so as not to be alleged of being biased towards one against the other. The litigants know best as to what they desire and it is not for the court to pursue a perfunctory approach to determining a dispute by concocting or generating cause or causes of action which were not pleaded in the first place.

[34] We find support in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665; [2009] 3 MLRA 162 where the Federal Court held, inter alia, that:

> [33] Second, *the proposition of the Court of Appeal was not even pleaded by the respondent. The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the parties must abide by their pleadings*. This is trite as can be seen from the decision of this court in *Menah Sulong v Lim Soo & Anor* [1983] CLJ Rep 263; [1970] 1 MLRA 1; [1983] 1 CLJ 26 where Ong Hock Thye CJ said:
>
> > I think it is necessary in this case to emphasise once again that the Courts should give their decision in strict compliance with the pleadings. As Loard Radcliffe said in *Esso Petroleum Co Ltd v Southport Corporation* [1956] 2 WLR 81, 91.
> >
> > If an Appellate Court is to treat reliance as pedantry or mere formalism I do not see what part they play in our trial system. (Emphasis added.)

[35] Another reason why we find that the learned High Court judge further fell into error, in dismissing the plaintiff's action is when he found in para 13 of the grounds of judgment, that there was an admission made by the defendant that the consideration price had not been paid in full. This is what

A the learned High Court judge held:

> [13] YTS told the Court that the plaintiff never gave any notice or request for the payment of the consideration price after the expiry of the 36 months period. *He admitted that he had not paid it in full* . (see p 7 of encl 8) (Emphasis added.)

B

[36] In the light of our findings that the learned High Court judge has relied on an un-pleaded material issue to dismiss the plaintiff's case notwithstanding the admission of the defendant that the consideration for the said Land A has not been paid in full, we are of the considered view that the decision of the C learned High Court is wrong in law and fact.

[37] On the issue of the two advances amounting to RM2,160,000, we are in agreement with the plaintiff's contention that the learned High Court judge erred in law and in fact in holding that the advances amounting to D RM2,160,000 paid by the defendant to the plaintiff are in part payment towards the consideration price for the said Land A.

[38] It is not disputed that the defendant had made the following two part payments namely: E

(a) the first payment of RM1,660,000 was stated in the payment voucher of the defendant dated 3 March 2014 (at p 130 of encl 6) as 'Advance to Phoenix Oasis to settle the land loan (PT1081)'. It is not disputed that the amount had been paid to redeem the said Land A from CIMB Bank; F and

(b) the second payment of RM500,000 was also recorded in the payment voucher of the defendant dated 19 November 2014 as being paid to the plaintiff as 'Advance Payment' (at p 132 of encl 6).

G

[39] In paras 20–21 of his grounds of judgment the learned High Court judge in reliance of cll 4.2 and 4.3 of the said JV agreement, concluded that the said advance of RM1,660,000, which was used to redeem the said Land A, was made pursuant to cl 4.2 of the same agreement and the second advance of H RM500,000 which was in the form of cash were made pursuant to cl 4.3 of the same agreement (for cll 4.2 and 4.3 of the said JV agreement, see p 110 of encl 6).

[40] The learned High Court judge proceeded to hold in para 21 of his grounds of judgment as follows: I

> I do not see how the conversion into a loan to both the directors altered the situation. PW2 did not explain this and the auditor was not called. Hence, there was no satisfactory evidence to support this contention. (see p 1 of encl 8)

[41] We take the view that the learned High Court judge had clearly disregarded the subsequent events that occurred when the two common directors of the defendant namely Yeoh Thiam Soon and Yeoh Thiam Leong, decided to reclassify the two advances as advances to the directors instead of applying the advances to reduce the consideration price of the said Land A in accordance with cl 4.2 and 4.3 of the said JV agreement.

[42] The direct consequence of this reclassification had the effect of creating a debt by the plaintiff to the directors namely Yeoh Thiam Soon and Yeoh Thiam Leong. As the advances were from the defendant, the reclassification also had the effect of creating a debt owed by Yeoh Thiam Soon and Yeoh Thiam Leong to the defendant. As a result, the learned High Court judge clearly ignored the fact that those two advances could no longer go towards reducing the consideration price of the said Land A.

[43] There is also cogent evidence that Yeoh Thiam Soon and the defendant acted on this reclassification in the following manner:

(a) Yeoh Thiam Soon relied on the said debt and presented a winding-up petition against the plaintiff;

(b) the defendant declared a dividend to Yeoh Thiam Soon and Yeoh Thiam Leong and a substantial part of the dividend amounting to RM2,160,000 was set off against the debt owed by Yeoh Thiam Soon and Yeoh Thiam Leong to the defendant. For winding up petition, see pp 187–197 of encl 6. For defendant's resolution to declare dividend, see pp 140 of encl 6;

(c) in view of the said reclassification and the conduct of Yeoh Thiam Soon and the defendant above, the defendant is now estopped from relying on cl 4.2 and 4.3 of the said JV agreement;

(d) the conversion or reclassification of the loan was supported by the testimony of PW2 and the contemporaneous documents;

(e) PW2, Yvonne Lim Lee Hwa, testified and explained the conversion of the two advances into loans to both the said directors. She was the account manager of the defendant who was subpoenaed to testify on behalf of the plaintiff. She was the person who prepared the account and did the relevant entries in the standard ledger of the defendant;

Reclassification of loan

(f) PW2 testified that she was asked by the auditor to reclass or to treat the said sum of RM2,160,000 as a loan from the defendant to Yeoh Thiam Leong and Yeoh Thiam Soon as directors of the defendant. PW2

referred to the defendant's standard ledger at p 5 of encl 7, where the plaintiff's account was credited with the total of RM2,160,000 and the balance became '0' (item 4);

(g) the amount of RM2,160,000 was then debited in the director's account at pp 6–7 of encl 7. Yeoh Thiam Leong's account was debited with RM756,000 (see p 6 of encl 7, item 3) which is 35% of RM2,160,000 in accordance with his shareholdings in the defendant. Yeoh Thiam Soon's account at p 7 of encl 7, item 1 shows RM1,404,000 was debited in accordance with his shareholdings of 65% in the defendant;

Declaration of dividend to offset the loans to directors

(h) PW2 then explained how the amount of RM2,160,000 was offset by the declaration of dividend of RM2,500,000 by the defendant. The resolution for the declaration of dividend is at p 140 of encl 6;

(i) PW2 further explained that 'the directors declare RM2.5m dividend and they use this dividend to offset their loan of RM2,160,000 and the balance is *paid by company cheque*' (see p 129 of encl 5);

(j) out of the RM2.5m, Yeoh Thiam Leong's share of dividend was 35% ie RM875,000. This amount was offset against the loan of RM756,000 leaving the balance dividend of RM119,000. The defendant then issued a cheque of RM119,000 to Yeoh Thiam Leong. This amount of RM119,000 is reflected in the Standard Ledger at p 6 of encl 7, item 5, entry on 30 December 2016; and

(k) on the other hand, Yeoh Thiam Soon's share of dividend was 65% i.e RM1,625,000. This amount was offset against the loan of RM1,404,000 leaving the balance dividend of RM221,000. This amount was paid by the defendant to Yeoh Thiam Soon and it was reflected in the Standard Ledger at p 7 of encl 7, item 3, entry on 30 December 2016.

[44] From the evidence adduced, we find that it is clear that the total sum of RM2,160,000 which was in initially paid by the defendant, had been treated as loans to Yeoh Thiam Soon and Yeoh Thiam Leong as directors of the defendant and the said loans were 'repaid' by them through the declaration of RM2.5m dividends.

[45] Thus, the learned High Court judge's finding that he did not see how the conversion of the two advances into a loan to both the said directors altered the situation is erroneous especially in the light of the testimony of PW2 and the various evidences adduced. We are also of the considered opinion that the learned High Court judge was plainly wrong in arriving in his decision and committed a serious appellate error that justify our intervention as the learned

High Court judge has made erroneous finding of facts based on the evidence before him and applied the relevant laws incorrectly.

CROSS-APPEAL

[46] The defendant filed a notice of cross-appeal against the learned High Court judge's finding of fact that the agreed consideration is the original consideration that is RM39.36 PSF of the Land A as per the joint venture agreement instead of the reduced consideration of RM19 PSF as contended by the defendant.

[47] The plaintiff has on 8 February 2021 served a notice of preliminary objection against the defendant's notice of cross-appeal as the essence of the cross-appeal is against the learned judge's finding of facts on the agreed consideration price is based on RM39.36 PSF. The defendant contends that the agreed rate should be based on cl 1(a) of the second supplementary agreement dated 16 February 2015 at RM19 PSF.

[48] Having heard arguments, we found that there are no merits in the plaintiff's preliminary objection and we accordingly dismissed it.

[49] In respect of the cross-appeal, having perused the notes of proceedings and considering the documentary and oral evidences adduced, we are of the considered opinion that the learned High Court judge was right in holding that the agreed consideration is the original consideration, that is RM39.36 PSF and not the reduced consideration of RM19 PSF as contended by the defendant.

[50] The defendant contended that the plaintiff is bound by the four corners of their pleadings and the fact that they did not inform the court about the existence of the second supplementary agreement whereby the price of the Land A has been changed to RM19 PSF and that the transfer of the said Land A, was in fact carried out, based on RM19 PSF, has clearly showed that the plaintiff did not come to this court with clean hands. With respect, we find that such a contention to be without merit as the plaintiff's pleaded case is grounded on the claim for the original consideration as stated in the said JV agreement. As such, there is no necessity for the plaintiff to plead the existence of the second supplementary agreement.

[51] The defendant further contended that the existence of the second supplementary agreement that was signed between the defendant and the plaintiff was not disputed. The defendant further submitted that the plaintiff had testified that the second supplementary agreement which had changed the consideration of the said Land A, from the original consideration to the

reduced consideration and that the sum of RM19 PSF was utilised for the purpose of transfer of the land and the stamp duty paid, was also based on RM19 PSF.

[52] We are of the considered opinion that there is no merits in this contention of the defendant that the learned High Court judge is wrong in law and in fact in deciding that the consideration for the said Land A, is the original consideration without taking into account, the existence of the second supplementary agreement which stated that the consideration should be the reduced consideration.

[53] During cross-examination of DW1, Yeoh Thiam Soon, we noted that he admitted that the reduced consideration of RM19 PSF as stated in the second supplementary agreement is only to facilitate the transfer of said Land A from the plaintiff to the defendant for the purpose of the amalgamation of the various lands.

[54] DW1 himself also admitted during cross-examination that as far as the entitlement is concerned, the price is the entitlement of the plaintiff in the said JV agreement. This is what he said:

PC: But as far as the price is concerned, the entitlement is concerned, that is the only entitlement of the plaintiff The price. No other.

DW1: In the JV Agreement, yes.

[55] Further, DW1 also admitted that both the audited account and the ledger of the plaintiff had confirmed that the consideration f or t he s aid Land A , is the original consideration.

PC: So in fact the audited account … am I right to say that the audited account of the plaintiff also confirm that this is the price of the consideration, 39.36?

DW1: *Yes.*

PC: Correct? Is audited account confirmed that, right? Am I right?

DW1: *Yes.*

PC: In fact Dato' that even the ledger of the plaintiff … the ledger, the computer accounting software that you maintain in the defendant also has this figure of 39.36 as the consideration? Am I right?

DW1: I'm not very sure about that but I supposed so. (Emphasis added.)

[56] DW1 also confirmed that the second supplementary agreement was prepared by a lawyer by the name of Ricky Tan. The defendant could have called the said Ricky Tan as their witness since he was in the meeting and had prepared the said supplementary agreement and thus is a material witness to prove DW1's testimony that the original consideration for the said Land A, had

been reduced to the reduced consideration. We find that the learned High Court should have invoked an adverse inference against the defendant for failing to call the lawyer to testify under s 114(g) of the Evidence Act 1950.

[57] Besides that, the defendant's account manager, PW2, Yvonne Lim Lee Hwa testified that she was not informed of the reduction or to update the account to reflect the purported reduction of the consideration of the said Land A.

[58] Further, DW1 had admitted that the plaintiff paid the Real Property Gain Tax in respect of the said Land A, based on the original consideration and he, as the director and shareholder of the plaintiff had issued a cheque from his personal fund to contribute his portion to pay for the Real Property Gains Tax.

[59] Clauses 1(a) and (b) of the second supplementary agreement (at p 136 of encl 6) clearly shows that the purpose of the transfer of the said Land A and that the plaintiff's entitlement shall remain the same as follows:

(a) the parties agree that the JV Partner shall execute all reasonable documents at the expense and cost of the developer to give intention to the transfer and amalgamation of the said Land A pursuant to the JV and for this purpose, the consideration of the transfer shall be in the sum of RM19 PSF amounting to the total sum of RM3,364,356 (approximately 177,071.40 sqft); and

(b) for avoidance of doubt, the JV partner entitlements and rights and interest shall remain the same in the JV and shall be distributed in the manner provided therein.

[60] In the light of the above, we find that there is cogent evidence that there was no reduction of the original consideration of the said Land A, to the reduced consideration as alleged by the defendant. The defendant's contention is inconsistent with all the relevant contemporaneous documents.

[61] In respect of the cross-appeal, we are of the considered opinion that the learned High Court judge did not err in arriving in his decision and did not commit any appellate error that justify our intervention as the learned High Court judge has made finding of facts based on the evidence before him and applied the relevant laws correctly.

CONCLUSION

[62] Premised on the reasons enumerated above, we find that there are merits in the appeal and the appeal is allowed with costs. In the premises, we order that judgment be entered against the defendant in the following terms:

A (a) for the sum of RM6,959,685.18;

(b) interest at the rate of 5%pa on the said sum of RM6,959,685.18 from 9 February 2016 until the date of judgment; and

(c) interest at the rate of 5%pa on the said sum of RM6,959,685.18 from
B the date of judgment until full and final settlement.

The decision of the High Court dated 1 June 2020 is set aside.

[63] In respect of the cross-appeal filed by the defendant, we find that there
C are no merits in the cross-appeal. In the premises, we dismissed the cross-appeal with costs.

[64] We award global costs to the plaintiff, in the sum of RM35,000 subject to allocator.

D

Appeal allowed; High Court's decision set aside; respondent's cross-appeal dismissed with global costs of RM35,000 to appellant subject to allocator.

Reported by Dzulqarnain bin Ab Fatar

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